APPENDIX

Excerpt (pages 13-14) from Petition of Intervenor Robert W. Scarth, *et al.* for Rehearing *En Banc* filed in *NICOR Exploration Co. v. FERC*, Fifth Cir. No. 94-40246.

E. The Court *En Banc* Should Reconsider The Appropriate Standard Of Reviewing FERC Interpretation Of ARCs

The Panel concluded that FERC's contract interpretation is a matter of law that is not entitled to deference, but instead *de novo* review (Op. at 11). Scarth submits that the Court *en banc* should reconsider this standard of review. First, deference is appropriate under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984), which held that a court must defer to an agency's ruling on a statutory interpretation question of law if it is based on a permissible construction. The same rationale applies here. Tariffs "are binding contracts," and "[t]he task of interpretation of tariffs . . . is akin to the task of statutory interpretation . . . [both involving] mainly questions of law." *Coca-Cola Co. v. Atchison, T & S.F. Ry.*, 608 F.2d 213, 219 (5th Cir. 1979). Scarth's contracts with NICOR are its FERC tariffs. In view of *Chevron* and the rationale of *Coca-Cola*, deference is compelled of agency interpretations of both statutes *and* contracts.[12]

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[12]Other circuits apply *Chevron* to contract interpretation or otherwise provide deference to agency legal conclusions. *See, e.g., First Indep. Group, Inc. v. SEC*, 37 F.3d 30, 32 (2d Cir. 1994); *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1155 (7th Cir. 1994); *National Fuel Gas Supply*

(continued...)

Deference also is appropriate in view of FERC's expertise. In *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 114 (1958) [hereinafter *Memphis*], the Court held that the contract interpretation issue "involves matters peculiarly within the area of the Commission's special competence and as to which we could hardly be aided by a further examination of the record by the Court of Appeals." Scarth recognizes that *Pennzoil I* held in a footnote that the reference in *Memphis* to FERC's "special competence" does not mean that FERC "is more competent than courts in this area." 645 F.2d at 386 n.53. *Scarth requests reconsideration of this holding*. Scarth submits that the reference in *Memphis* to "peculiarly within the area of the Commission's special competence" can only reasonably be interpreted to mean "greater than" court competence.

Here, FERC exercised its "special competence" in interpreting ARCs that were required to take into account a FERC regulation [18 C.F.R. § 154.93 (b-1)], that limited the permissible language at the risk of FERC rejection. 18 C.F.R. § 157.25, Exh. B. Moreover, FERC's Opinion 77, issued after *Pennzoil I*, relied upon the "record developed in the [Order 23] rulemaking proceedings" and "the accumulated experience of the Commission in dealing with . . . [ARCs] in a variety of settings," and noted that ARCs "were a product of the then prevailing [NGA] regulatory scheme." 10 FERC at 61,396. FERC applied its expert

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[12](...continued)
Corp. v. FERC, 811 F.2d 1563, 1570 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987); *Consolidated Gas Supply Corp. v. FERC*, 745 F.2d 281, 291 (4th Cir. 1984); *cert. denied*, 472 U.S. 1008 (1985).

knowledge of the "prevailing regulatory scheme" here, and found that, during the contract negotiations (1969-1970), there was "no specific FPC-established ceiling rates" for gas under the contracts, and in the 1970 contracts NICOR *agreed to pay* "a non-cost-based prevailing 'in line' rate" that exceeded the proposed rates contemporaneously found by an ALJ to be "just and reasonable." 63 FERC at 61,181 n.14; 66 FERC at 61,773 n.25.